FILED
NOV - 7 1996

No. 96-358

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

November 7, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-358

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Norfolk & Western Railway Company, has consented to AAR's filing of a brief.[1] Respondent, James L. Chittum, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only

---

[1] The letter expressing consent has been filed with the Clerk of the Court.

when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2] This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation

---

[2] *E.g., Metro North Commuter R.R. Co. v. Buckley*, 79 F.3d 1337 (2nd Cir.), *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Commission*, 481 U.S. 454 (1986).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts sometimes fail to appreciate that FELA is a unique statute. While FELA's obligation to respond in unlimited damages is unprecedented, and substantial compared to the obligations imposed on other employers, FELA limits employer obligations in some ways that workers' compensation does not. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court, in a ruling that plainly is inconsistent with this Court's decision in *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980), has greatly increased railroad liability under FELA. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

November 7, 1996

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE FAILURE OF THE COURT BELOW TO FOLLOW THIS COURT'S *LIEPELT* DECISION WILL RESULT IN AN UNWARRANTED AND SUBSTANTIAL INCREASE IN RAILROAD LIABILITY UNDER FELA	4
II. REFUSAL TO PERMIT INTRODUCTION OF EVIDENCE REGARDING THE IMPACT OF RAILROAD RETIREMENT TAXES WILL CREATE A DISINCENTIVE FOR EMPLOYEES TO RETURN TO THE JOB	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases Page

Kozar v. Chesapeake & Ohio Ry. Co., 449 F.2d 1238 (6th Cir. 1971) 4

Michigan Central R.R. Co. v. Vreeland, 227 U.S. 59 (1913) 5

Norfolk & Western Ry. v. Liepelt, 444 U.S. 490 (1980) ..... *passim*

Wildman v. Burlington Northern R.R. Co., 825 F.2d 1392 (9th Cir. 1987) 4

Statutes and Regulations

26 U.S.C. § 3201 5

26 U.S.C. § 3202 5

26 U.S.C. § 3231(e)(2) 5

42 U.S.C. § 430 5

45 U.S.C. § 51 4

45 U.S.C. § 53 4

46 U.S.C. § 688 2

49 C.F.R. pt. 1201, 1-1(a) 7

Miscellaneous

ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT 2

ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS (1996 ed.) 7

Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No. 4) 6 (1995) 8

GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (August 1996) 7, 8

GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG TERM VIABILITY (1995) 2

Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995) 8

U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-358

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JAMES L. CHITTUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, product 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and the administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Con-

gress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. In 1995, for example, 5,790 lawsuits were brought.[2] AAR's members expend substantial sums of money defending FELA claims, and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work-related injuries.[3]

This case is of particular concern to AAR's members. The railroad defendant sought to introduce evidence demonstrating that plaintiff's future income would have been reduced by the deduction of railroad retirement taxes from his paycheck. It is AAR's understanding that FELA plaintiffs generally have not made this an issue, acknowledging that their wage loss would not include amounts deducted for railroad retirement taxes. How-

---

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 3-3 (May 1996). (CLAIM AND LITIGATION REPORT). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. CLAIM & LITIGATION REPORT at 2-2. Over the past five years, AAR members have spent, on average $1.2 billion on FELA annually, or nearly 3.7 percent of their gross revenues. CLAIM & LITIGATION REPORT, (Calendar years 1991, 1992, 1993, 1994, 1995).

ever, by excluding this evidence, the Virginia court opened the door to FELA awards that far exceed plaintiffs' actual losses, which many FELA plaintiffs now undoubtedly will pursue. This has the potential substantially to increase the already high damages paid by railroads under FELA. Moreover, the prospect of compensation in excess of take home pay will hinder efforts to get injured rail employees back to work promptly.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that a defendant in FELA cases may introduce evidence of the effect of federal income taxes on the plaintiff's earnings. The Court reasoned that the plaintiff is entitled to recover damages for only the loss of wages that actually would have been received, and that that amount unquestionably is affected by the plaintiff's obligation to pay income taxes. This principle applies equally with respect to amounts plaintiff is obligated to pay in railroad retirement taxes. The ruling below, disallowing evidence of plaintiff's railroad retirement tax obligations, will result in overcompensation of FELA plaintiffs and increased liability against railroad defendants.

In addition to expanding railroad liability, the ruling below will hinder efforts to rehabilitate injured railroad employees. Allowing FELA plaintiffs to collect more money while they are off of work due to an injury than they would receive on the job will create an additional incentive for injured railroad employees to avoid rehabilitation and prompt return to employment.

ARGUMENT

I. THE FAILURE OF THE COURT BELOW TO FOLLOW THIS COURT'S *LIEPELT* DECISION WILL RESULT IN AN UNWARRANTED AND SUBSTANTIAL INCREASE IN RAILROAD LIABILITY UNDER FELA

In the ruling below, the Virginia Supreme Court ignored the teaching of this Court in *Liepelt*, transforming FELA into a compensation law that pays rail workers suffering an injury more money while disabled than they would earn back on the job.

FELA is a unique compensation law that permits railroad employees injured on the job to collect damages for both economic and noneconomic losses suffered.[4] In contrast, the workers' compensation systems that cover the vast majority of other American workers set limits on the amount of compensation that can be recovered for lost wages, and generally do not allow recovery of damages for pain and suffering.[5] Unlike FELA, however, the workers' compensation laws do not adjust awards to account for employer negligence and the contributory negligence of the employee.[6]

It clearly is not the purpose of FELA to make injured employees more than whole for their work-related injuries. Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that em-

---

[4] While there are no limits on compensatory damages, FELA does not permit recovery for punitive damages. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987).

[5] U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Table VI (1994).

[6] Under FELA, the employer is liable for damages if the employers's negligence played a role in causing the injury, 45 U.S.C. § 51, however, damages are reduced in proportion to the employee's contributory negligence. 45 U.S.C. § 53.

ployees receive compensation for the actual pecuniary loss suffered. *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Adhering to that principle, in *Liepelt*, this Court ruled that a FELA defendant is entitled to a jury instruction that any damages awarded the plaintiff are not subject to taxes, and to present evidence of the income taxes payable on the plaintiff's past and future income. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages for past and future lost wages. As the Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493.

There is absolutely no public policy reason why the principle applied by this Court in *Liepelt* with regard to income taxes should not apply with equal force to taxes paid to support the railroad retirement system.[7] In addition to income taxes, each rail employee and employer is subject to the Railroad Retirement Tax Act (RRTA).[8] There are two aspects of railroad retirement taxes, tier I and tier II, both of which are contributed to by the employer and employee. RRTA requires that the employer withhold from each employee's pay a specific percentage of compensation. For tier I, 7.65 percent of the employee's compensation, up to a threshold of $62,700, is withheld; for tier II, 4.9 percent of the employee's compensation, up to a threshold of $46,500, is withheld.[9]

---

[7] The Railroad Retirement system is unique to the railroad industry. It provides benefits that are comparable to Social Security, as well as benefits not available to employees covered by the Social Security system.

[8] 26 U.S.C. § 3201 *et seq.*

[9] *See* 26 U.S.C. §§ 3201, 3202, 3231(e)(2) and 42 U.S.C. § 430. Of the 7.65 percent withheld for tier I taxes, 1.45 percent is earmarked for Medicare. While the employer and employee contribute equal shares under tier I, the employer pays about 77 percent of the tier II taxes. The compensation thresholds are adjusted each year.

The court below rejected the railroad's argument that under *Liepelt* the employee's obligation to pay these taxes, with its resultant reduction in take home pay, should be brought to the jury's attention by the defendant. In reaching this decision, the court offered nothing more than a summary conclusion that railroad retirement taxes have not been equated with income taxes by this Court. However, the court failed to consider the rationale behind the *Liepelt* decision.

The rationale that *Liepelt* applied to income taxes applies equally with respect to railroad retirement taxes. As with income taxes, the money paid in railroad retirement taxes is not available to rail workers to support themselves and their families. In fact, because there is no equivalent to tier II under the Social Security system, total deductions for railroad retirement taxes made from the wages of a rail employee are greater than the deduction for FICA taxes made from the wages of a Social Security employee at the same income level. Failing to take railroad retirement taxes into consideration when awarding compensation results in a windfall for the employee just as does failing to take income taxes into consideration. Moreover, unlike income taxes, which vary with each employee's individual circumstances, the amount of railroad retirement taxes to be paid by each worker is fixed, and therefore easily ascertainable. Thus, allowing introduction of evidence of railroad retirement taxes is less likely to result in "protracted expert testimony and debate" which the *Liepelt* Court recognized as a concern with income taxes. 444 U.S. at 494.

Under the ruling below, FELA juries in awarding damages will not know that plaintiffs typically have as much as 12.55 percent of their wage deducted to pay railroad retirement taxes. Consequently, it is almost inevitable that such plaintiffs will be given awards that exceed their actual take home pay.

The impact of denying rail defendants the ability to introduce evidence of railroad retirement taxes is significant. The average annual compensation of Class I rail employees in 1995 was $48,188.[10] During the last five years, the railroad industry closed a total of about 134,000 FELA cases in which a payment was made, paying out, on average, over $900 million annually.[11] While in many cases the employee returned to work promptly, substantial numbers of employees claimed significant wage loss as a result of their injuries. Many alleged that they were permanently disabled from returning to the workforce, and therefore entitled to wage loss compensation covering the remainder of their work lives.[12] If, as the Virginia court ruled, that compensation must include amounts that would have been deducted from wages for railroad retirement taxes, it will increase railroad liability significantly.

II. REFUSAL TO PERMIT INTRODUCTION OF EVIDENCE REGARDING THE IMPACT OF RAILROAD RETIREMENT TAXES WILL CREATE A DISINCENTIVE FOR EMPLOYEES TO RETURN TO THE JOB

Irrespective of the impact of the ruling below on railroad liability, there is another reason why this Court should review the Virginia court's decision. Failure to permit jury instructions and evidence related to the effect

---

[10] Association of American Railroads, Railroad Facts 56 (1996 ed.). Class I railroads, which primarily constitute AAR membership, are those with annual revenues of $250 million or more. 49 C.F.R. pt. 1201, 1-1(a) (1995).

[11] CLAIM & LITIGATION REPORT at 2-1.

[12] Of about 10,000 FELA cases closed by four major railroads in 1994, the employee did not return to the job in about 1,300 cases. *See* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (August 1996). (GAO FELA Report).

of railroad retirement taxes is inconsistent with the important public policy goal of rehabilitating injured workers and returning them to productive employment.

One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches or exceeds the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[13] Because FELA permits full recovery of wage loss it already contains a disincentive for employees aggressively to pursue rehabilitation.[14] Under the ruling below, rail employees are in a position not merely to recover their full take home pay, but also to collect amounts that would be deducted from their paychecks had they returned to the job. Thus, the ruling below creates a perverse financial incentive for able workers to claim a disability and for injured workers to remain disabled as long as possible. Any incentive to complete rehabilitation and return to work surely will be further diminished if FELA enables rail workers to recover compensation that substantially exceeds their take home pay by remaining off the job.

---

[13] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No. 4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

[14] *See* GAO FELA Report at 25.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia in this case be granted.

Respectfully submitted,

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

November 7, 1996

* Counsel of Record